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U.S. Citizenship and Immigration Services

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[redacted]

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FILE: [redacted] Office: NEWARK, NJ Date: APR 11 2007

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Ellen C. Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Newark, NJ denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed as the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), thus the relevant waiver application is moot.

The applicant is a native and citizen of Columbia who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant is the husband of a naturalized citizen of the United States and the father of two U.S. citizen children (ages six and four). He seeks a waiver of inadmissibility under section 212(h) of the Act so as to remain in the United States with his naturalized citizen spouse and U.S. citizen children.

The district director concluded that the applicant had failed to establish that extreme hardship would be imposed on his qualifying relatives, and therefore denied the Application for Waiver (Form I-601). *Decision of the District Director*, May 7, 2005.

On appeal, counsel states that the applicant's failure to file the United States Customs Form 4790 constitutes a crime involving moral turpitude under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), rendering him inadmissible to the United States. However, counsel states that the applicant has established that he should be granted a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h), based on the extreme hardship that will be suffered by the applicant's wife and children if he is inadmissible to the United States and returned to Columbia.

The entire record, including the appeal and the evidence submitted on appeal, has been reviewed in rendering this decision.

Section 212(a)(2) of the Act states in pertinent part, that:

> (A)(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
>
> > (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

> (h) The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> . . . .
>
> (1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

The record reflects that on October 20, 1997, the applicant was convicted pursuant to 31 U.S.C. § 5316(a)(1)(A), Failure to File U.S. Customs Form, and 18 U.S.C. § 2, as a principal.

Counsel agrees with the director's conclusion that the applicant committed a crime involving moral turpitude. The AAO finds based on the record and relevant case law, the applicant's convictions do not involve moral turpitude under immigration law.

The Board of Immigration Appeals ("Board") held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992) that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general. Assault may or may not involve moral turpitude. Simple assault is generally not considered to be a crime involving moral turpitude.
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Goldeshtein vs. I.N.S.*, 8 F.3d 645, 647 (9th Cir. 1993), a case involving structuring financial transactions to avoid currency reports, the Ninth Circuit Court of Appeals stated that:

> Whether a crime is one with intent to defraud as an element, thereby making it a crime involving moral turpitude, is determined by the statutory definition or by the nature of the crime not by the specific conduct that resulted in the conviction. *McNaughton v. INS,* 612 F.2d 457, 459 (9th Cir.1980); *see also United States ex rel. Robinson v. Day,* 51 F.2d 1022, 1022-23 (2d Cir.1931) ("Neither the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition [the crime] does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral"). For a crime to involve moral turpitude within the meaning of the [Immigration and Naturalization Act] INA, the crime "'must *necessarily* involve moral turpitude.' " *Chu Kong Yin,* 935 F.2d at 1003 (quoting *Tseung Chu v. Cornell,* 247 F.2d 929, 935 (9th Cir.), *cert. denied,* 355 U.S. 892, 78 S.Ct. 265, 2 L.Ed.2d 190 (1957)) (emphasis in *Tseung Chu*).

The applicant was convicted under 31 U.S.C. § 5316[1] which reads as follows:

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[1] The AAO notes that violation of 31 U.S.C. § 5316 does not require a person to make a false material statement to the United States Customs Service.

> **(a)** Except as provided in subsection (c) of this section, a person or an agent or bailee of the person shall file a report under subsection (b) of this section when the person, agent, or bailee knowingly—
> **(1)** transports, is about to transport, or has transported, monetary instruments of more than $10,000 at one time—
> **(A)** from a place in the United States to or through a place outside the United States; or
> **(B)** to a place in the United States from or through a place outside the United States; or
> **(2)** receives monetary instruments of more than $10,000 at one time transported into the United States from or through a place outside the United States.

The applicant was also convicted under 18 U.S.C. § 2, which states:

> **(a)** Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> **(b)** Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The applicant committed two crimes. The AAO will first address whether the conviction of failing to report exported currency is a crime of moral turpitude.

The resolution of this question turns on whether intent to defraud is an essential element of the crime. *See Hirsch v. INS,* 308 F.2d 562, 567 (9th Cir.1962) ("A crime that does not necessarily involve evil intent, such as intent to defraud, is not necessarily a crime involving moral turpitude."); *see also Jordan v. De George,* 341 U.S. 223, 227, 71 S.Ct. 703, 706, 95 L.Ed. 886 (1951) (analyzing judicial definitions of moral turpitude and citing with approval the Second Circuit's statement that "fraud has ordinarily been the test to determine whether crimes not of the gravest character involve moral turpitude") (citing *United States ex rel. Berlandi v. Reimer,* 113 F.2d 429 (2d Cir.1940)).

A relevant case to the issue of whether a conviction for failure to report exported currency constitutes moral turpitude is *U.S. v. Bajakajian*, 524 U.S. 321 (1998). The respondent in *Bajakajian* pleaded guilty to failure to report exported currency. Section 982(a)(1) orders currency to be forfeited for a "willful" violation of the reporting requirement. The U.S. Supreme Court analyzed whether forfeiture of the respondent's unreported currency was excessive. In finding that forfeiture was excessive, the Supreme Court held that the respondent's crime of failure to report exported currency was solely a reporting offense. It was permissible to transport the currency out of the country so long as it is reported. *Id.* at 337. Thus, the Supreme Court found that the essence of the respondent's crime was a willful failure to report the removal of currency from the United States, and it noted that the respondent's violation was unrelated to any other illegal activities. *Id.* at 337-338. The Supreme Court stated that: "The harm that respondent caused was also minimal. Failure to report his currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and respondent caused no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived only of the information that $357,144 had left the country." *Id.* at 339.

In applying the reasoning of *Bajakajian* to the case under consideration here, the AAO finds that the applicant's crime of failure to report exported currency is not a crime of moral turpitude. The applicant's failure to report exported currency is considered solely a "willful" violation of a reporting requirement. It does not constitute a fraud on the United States and there has been no loss to the pubic fisc. Like the situation in *Bajakajian*, the government would be deprived only of the information that currency had left the country. The AAO notes that the record of conviction does not indicate that applicant's violation was related to any other illegal activities.

With regard to the applicant's conviction as a principal under 18 U.S.C. § 2, the AAO finds that this crime does not form an independent basis for a finding of moral turpitude. It is stated that a conspiracy to commit an offense involves moral turpitude only when the underlying substantive offense is a crime involving moral turpitude. *Goldeshtein* at 647 n.6, citing *McNaughton,* 612 F.2d at 459. (per curiam) In *Goldeshtein* the Ninth Circuit held that because the respondent's underlying conviction under 31 U.S.C. § 5324(a)(3) for structuring financial transactions with domestic financial institutions to avoid currency reports did not involve a crime of moral turpitude, his conviction for conspiracy, 31 U.S.C. § 5322(b), which was based on the underlying 31 U.S.C. § 5324(a)(3) conviction, was not a crime of moral turpitude. In applying the reasoning in *McNaughton* and *Goldeshtein* to the situation here, the applicant's conviction as a principal under 18 U.S.C. § 2 would not involve moral turpitude as the underlying conviction for failure to report exported currency is not considered a crime of moral turpitude.

Based on the record, the AAO finds that the applicant did not commit crimes involving moral turpitude and he is therefore not inadmissible under section 212(a)(2)(A) of the Act. The waiver filed pursuant to section 212(h) of the Act is therefore moot. As the applicant is not required to file the waiver, the appeal of the denial of the waiver will be dismissed.

ORDER: The May 7, 2005 decision of the director is withdrawn. The appeal is dismissed as the underlying application is moot.